IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-952

MABEL FLINN, GENEVA LYNN,
AND GARNET LOISEAU,

Petitioners,

vs.

FMC CORPORATION and LOCAL 9,
TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
NO. 75-_____

MABEL FLINN, GENEVA LYNN,
and GARNET LOISEAU,

Petitioners,

- v -

FMC CORPORATION and LOCAL 9
TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fourth Circuit

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment entered in the above-entitled case on October 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not officially reported. It can be found at 10 EPD ¶ 10,408,

and is set forth in the Appendix at page A-18. The opinion of the District Court approving the compromise settlement is unreported. It is set forth in the Appendix at page A-13. Other opinions (unpublished) of the District Court in this case which are relevant to this petition are: Order of November 19, 1973, at A-1; Order of April 5, 1974, at A-4; Notice of Proposed Settlement of June 5, 1974, at A-6.

JURISDICTION

The judgment of the United States Court of Appeals for the Courth Circuit was entered on October 6, 1975. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code, § 1254(1), review of a judgment of the United States Court of Appeals for the Fourth Circuit having been requested.

QUESTIONS PRESENTED FOR REVIEW

1. Does Rule 23(e), Federal Rules of Civil Procedure, permit settlement of a Title VII class action certified under Rule 23(b)(2) when the named plaintiffs all object to the proferred settlement?

2. Does a court imposed settlement of a Title VII action over the objections of all named plaintiffs violate the Fifth Amendment's guarantee of due process?

STATUTORY PROVISIONS INVOLVED

This case involves various provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. This case also involves the provisions of Rule 23, Federal Rules of Civil Procedure, fully set forth in the Appendix, infra, at page A-33.

STATEMENT OF THE CASE

This action was filed by Petitioners, Mabel Flinn, Geneva Lynn and Garnet Loiseau, in the United States District Court for the Northern District of West Virginia, Parkersburg Division. Before instituting suit, the three female employees had filed charges of discrimination (dated November 15, 1968) with the Equal Employment Opportunity Commission (EEOC), alleging that their employer, a manufacturer of synthetic fibers, maintained an unlawful policy of job assignment, work assignment and seniority, which resulted in female employees earning less than male employees. It was also alleged that the Company's seniority system resulted in discrimination against women with respect to lay-offs, vacations and shift assignments. Following an investigation and an attempt at conciliation, the EEOC notified the plaintiffs of their right to sue in federal district court.

The complaint, styled as a class action,

was filed on May 24, 1971. The FMC Corporation (petitioners' employer) and Local 9, Textile Workers Union of America, AFL-CIO (petitioners' union) were named as defendants. It alleged that the defendants had violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.) and 42 U.S.C. § 1981 by discriminating against the plaintiffs based upon their sex. In addition, the complaint alleged that the defendant union had violated its duty of fair representation owed to the plaintiffs (29 U.S.C. § 151, et seq.).

More specifically, it was alleged that the defendant company, in its initial hiring and assignment decisions, segregated its male and female employees, assigning men to those jobs which carried a fixed hourly wage, while assigning women to those jobs which were compensated on a production or incentive basis. [1] Additionally, those jobs to which women were assigned were the jobs most affected by technological changes which, because of the nature of the industry and product being produced, have a significant and frequent impact upon the defendant corporation's operations.

The complaint further alleged that the impact of these practices penalized the female employees, while male employees did not suffer a corresponding

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[1] In the one department where females were employed on an hourly basis, it was alleged that the hourly rates were substantially less than those paid to men doing comparable jobs.

limitation upon their employment opportunities. It was contended that this disparate treatment was the result of acts committed by the defendant employer and that the effects of this discrimination were perpetuated by the collective bargaining agreement entered into by the two defendants.

The collective bargaining agreement in effect at the time the action was filed had been unchanged since 1942. It provided three types of seniority: plant seniority, which was used as the basic factor for figuring adjusted seniority; adjusted seniority, which was used to determine the order of lay-off and recall; and departmental seniority, which was used for promotional and bidding purposes within a given department. So long as an employee did not transfer out of the department to which originally assigned, plant, adjusted and departmental seniority dates remained the same. However, when an employee changed departments, the employee's departmental seniority date became the date of entry into that department. An employee's adjusted seniority date was established by taking the new departmental seniority date and adding to it one-half of the total plant service acquired prior to the most recent change in departmental status.

The effect of this seniority system was to lock female employees into all-female departments, which were more vulnerable to forced transfers or lay-offs due to technological change.

In the case of the petitioners, the effect of this system was dramatic. Garnet Loiseau was

first hired at the Parkersburg facility in 1935. The court record indicates that between 1935 and February, 1972, her job assignment changed fifty-five (55) times. As of February, 1972, her adjusted seniority date was May 28, 1955, and her departmental seniority date was June 17, 1968. Mabel Flinn, first hired in 1932, had an adjusted seniority date of February 7, 1948, and a departmental seniority date of June 25, 1963. Geneva Lynn was first hired in 1941, and due to numerous job reassignments, her adjusted seniority date became January 30, 1961, while her departmental seniority date was June 3, 1963.

In their prayer for relief, the plaintiffs sought to enjoin the discriminatory employment practices alleged, back pay, costs and attorneys' fees.

Following the filing of the complaint, it was stipulated among counsel for the parties that the "matter" was to be remanded to the EEOC in order to attempt to secure voluntary compliance and/or conciliation and that the district court proceedings would be stayed pending the outcome of conciliation attempts. After these negotiations proved fruitless, the parties returned to court, with the defendants filing their answers to the complaint on October 12, 1971.

During the next one and one-half years, numerous motions were filed by the plaintiffs, including a motion for summary judgment (February 8, 1972), an amended motion for summary judgment (February 22, 1972), a motion to appoint a special master pursuant to Title VII (April 2, 1972), a motion to amend the

complaint (June 5, 1972), a motion to certify the case as a class action (June 5, 1972), and a motion to intervene (August 28, 1972). In addition, eight (8) sets of interrogatories were served upon the defendants. On June 19, 1973, the district court held a hearing on these motions. Following this hearing, the court denied plaintiffs' motions for summary judgment and for the appointment of a special master, granted the motions to amend and to intervene and certified the proceedings under Rule 23(b)(2), Federal Rules of Civil Procedure. The class was defined to include, "all female union members employed in the Converting Department at FMC's Parkersburg facility as of June 19, 1973." (Order of June 19, 1973). The order did not direct provision of notice to any class members.

The Court in its order of June 19, 1973, also directed counsel to prepare for trial pursuant to local rule.

However, at a pre-trial conference on November 7, 1973, counsel for the parties submitted a settlement agreement to the district court. In the agreement, the parties noted that changes in the collective bargaining agreement and in the employer's affirmative action program provided the "necessary and desirable prospective relief to which all female members are entitled, and that no future problems are anticipated." The class of plaintiffs was redefined by the parties to include "all of those hourly paid bargaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972 . . . ."

Pursuant to this agreement, the defendants would pay $58,000 into the court, of which $48,000 would be "apportioned among the plaintiffs in such manner as the Court shall determine." The remaining $10,000 was specifically recommended as the appropriate amount for the court to award as plaintiffs' counsel fees and expenses. It was also provided that in the event of court approval of the settlement agreement, the plaintiffs' case would be dismissed with prejudice.

On November 19, 1973, the Court issued an order adopting the above-described provisions of the November 7, 1973, settlement agreement. The class was redefined without providing the direction of notice to the new class members encompassed by this order. The defendants were ordered to pay $58,000 into the court, $10,000 of which was to be paid for the services of the plaintiffs' attorneys of record, and $48,000 was "to be apportioned among the plaintiffs in such manner as the Court shall determine based upon further argument or evidence . . . ." (A-2).

The parties were directed to submit briefs to the Court setting forth their views as to how the $48,000 should be apportioned. Plaintiffs' counsel's earlier motion for payment of fees prior to the entry of a final order was taken under advisement. (A-2)

On April 5, 1974, the Court entered a second order relating to the settlement. This order states that "having been advised by counsel that an agreed settlement of all claims presented in this

civil action has been reached", the next step was to determine the amount of fees which should be paid to plaintiffs' counsel and "to designate the distributees of the settlement sum and to determine the amount of that sum to which each distributee is entitled . . . ." (A-5).

A proposed notice of settlement was submitted to the Court, and discussed during hearings held May 27, and 28, 1974. The notice, approved by the Court, began by providing that "all of the prospective substantive relief available to the claimants has already been granted, outside of litigation, by changes in work practices and seniority structures and through negotiations between the defendant Company and Union." (A-8). The notice went on to outline the manner in which the $58,000, deposited with the Court was to be distributed. (A-9, A-10).

It created three subclasses of claimants differentiated according to the amount of their plant seniority. The class members in the subclass of individuals holding the greater amount of seniority were to receive $225.00 per person. The dollar amounts awarded the individuals in the sub-class holding the least seniority were each awarded $85.00. Class members in the subclass of intermediate seniority were allocated $170.00 each. (A-9, A-10). The notice also provided an allocation of $10,000 to the Plaintiffs' counsel as a reasonable fee. (A-11).

The notice provided that if "any member of the class wishes to object to the proposed settlement or does not wish to participate therein, she

may object by serving written notice" directed to the clerk of the court. (A-11, A-12).

Of the 253 individuals identified as members of the class, five expressed dissatisfaction with the settlement (A-15), including all the original plaintiffs in the class suit: Mabel Flinn, Geneva Lynn, and Garnet Loiseau, petitioners here.

On August 2, 1974, the Court held a hearing on the proposed settlement, at which the five women testified who were dissatisfied with the settlement.

Each of the three petitioners testified that the amount which she would receive under the settlement ($255.00 each) was not adequate compensation in view of the loss which she had suffered over the years.[2] In addition, the testimony of these women pointed out that those changes in the seniority system, which had already gone into effect as a result of collective bargaining, were of questionable value, since the Parkersburg plant was being shut down. In addition, the Plaintiffs also testified that they had never authorized their counsel to enter into the proposed settlement agreement or counsel to accept $255.00 on their behalf in settlement of their claims.

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[2] These losses were estimated in a brief submitted by Plaintiffs on November 19, 1973, setting forth their theory of distribution of the $48,000. The estimated losses included $14,000 for Mabel Flinn and $14,000 for Garnet Loiseau. Geneva Lynn's loss was estimated to be $16,000, although she had stated them to be $28,000 since 1964 when the defendants deposed her. This deposition was filed with the Court.

After hearing the testimony of these five women, the Court orally approved the settlement as "just and meeting the standards of fairness and reasonableness." The fact that the plant where the Plaintiffs worked was closing was considered by the Court to be extraneous to the issue of the fairness of the settlement. In addition, the Court accepted the blanket statements of counsel that the collective bargaining process had provided all available prospective relief. The Court's apparent only concern was whether the formula for distribution of the $58,000 paid into Court almost a year earlier was appropriate.

On August 19, 1974, an order approving the settlement was entered, thereby forever releasing and discharging the defendants from any and all claims arising out of the matters alleged in the petitioners' complaint. (A-15, A-16). The provisions governing attorneys' fees was the only provision of the settlement which the Court failed to approve as originally proposed. Rather than awarding Plaintiffs' counsel the $10,000 originally requested, the Court ordered $3,000 to be paid to Plaintiffs' counsel who was then to submit additional information to the Court to substantiate the claim for the remaining $7,000 sought. Copies of counsel's affidavit was served, pursuant to Court order, upon opposing counsel and also upon each of the objecting parties in order to provide for the filing of objections. A subsequent order, entered September 17, 1974, awarded the additional $7,000 to Plaintiffs' counsel.

After having secured new counsel, petitioners

filed a notice of appeal from the decision of the court approving the settlement and dismissing their claims.

On October 6, 1975, the Court of Appeals for the Fourth Circuit affirmed the district court's order, finding no abuse of discretion on the part of the trial court. In its opinion, the Court of Appeals concluded that the notice to class members (which contained no mention of either a hearing on objections or of the date of such hearing) had provided an adequate notice of the hearing on objections. (A-25, A-26). The Court also concluded that the petitioners (who had testified at the hearing on objections that they had never authorized their retained counsel to negotiate a settlement on their behalf) had been represented in the negotiations by their retained counsel. After recognizing that the objecting plaintiffs were required to "be given the opportunity to retain new counsel to represent them in objecting to the settlement and to be heard in opposition" (A-26), the Court of Appeals concluded that the petitioners (who were never advised by the district court of their right to separate representation and who did not retain new counsel until after court approval of the settlement) had been granted this right.

Characterizing the petitioners' case to be more of a complaint about seniority and transfer rights under the collective bargaining agreement than about sex discrimination the Court of Appeals agreed with the district court's conclusion that the plaintiffs' claims

were weak. In reaching this decision, the Court apparently failed to consider relevant decisions of this and other courts which have scrutinized present practices in order to determine whether they perpetuated the effects of past discriminatory practices. See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, __ U.S. __, 95 S. Ct. 2362 (1975); Rios v. Enterprise Association Steamfitters Local 638, 501 F. 2d 622 (2nd Cir. 1974); Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), cert. granted, __ U.S. __, 96 S. Ct. 1421 (1975); Palmer v. General Mills, Inc., 513 F. 2d 1040 (6th Cir. 1975).

REASONS FOR GRANTING THE WRIT

1. To Clarify The Standard Applicable In Determining When A Proposed Settlement Of A Title VII Case, Certified As A Class Action Under Rule 23(b)(2), Meets The Requirements Of Rule 23(e).

a. Compromise Of A Class Action Under Rule 23(e) Is Permitted When The Fairness Standard Is Met

In holding that the district court did not abuse its discretion in approving the settlement in this case, the Court of Appeals took guidance primarily from legal precedents that had been developed in stockholder derivative actions

and in antitrust litigation. The Court at no time discussed the standard which a proposed settlement of a class action must meet under Rule 23(e) and whether application of the required standard may lead to dissimilar results in suits seeking to vindicate corporate as opposed to individual rights.

The history of Rule 23 prior to its amendment in 1966 had indicated that class actions were essentially of two types - those actions seeking to enforce common or derivative rights usually at issue in corporate litigation and those filed to vindicate individual rights of members of a wronged class. Where a named plaintiff sought to enforce common or derivative rights, the action could not be dismissed unless the interests of all class members were considered. However, where no question of common or derivative rights was involved, a plaintiff could settle or dismiss an action with impunity as long as other class members had not earlier intervened in the suit. 3B Moore's Federal Practice, ¶ 23.80[4] at 23-1551, ¶ 23.1.24 [2] at 23.1-405.

With the 1966 amendments to Rule 23 and the adoption of Rule 23.1, the members of a class were required to be provided with notice of any proposed settlement or dismissal and subsequent approval of the court was necessary. Although the rules provided no guidance as to the standard to be used in determining whether a settlement should be approved, the courts evolved the standard of fairness, reasonableness and the best

interests of the parties. Norman v. McKee, 431 F. 2d 769 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971); City of Detroit v. Grinnell Corp., 495 F. 2d 448 (2nd Cir. 1974).

The standard of fairness, while referred to as the appropriate standard both in class actions seeking to vindicate individual as well as corporate rights, was not applied in the same fashion in each. In stockholder derivative suits and other proceedings where the named plaintiff was prosecuting a claim on behalf of a corporation, courts refused to approve a settlement solely on the basis of the approval of the parties. Where the right at stake was common and joint, corporate well-being was typically the focus of the litigation. Unanimity among class members therefore was never viewed to be necessary for a settlement to be fair. See, Young v. Katz, 447 F. 2d 431 (5th Cir. 1971); Neuwirth v. Allen, ___ F. Supp. (S.D.N.Y. 1964), aff'd. 338 F. 2d 2 (2nd Cir. 1964); Norman v. McKee, supra.

Application of the fairness standard did not mandate the same result when reviewing class settlements involving individual interests. See, Newman v. Stein, 464 F. 2d 689, 692, fn. 6 (2nd Cir. 1972). In Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U. S. 414 (1968), a proceeding for reorganization of a corporation under Chapter X of the Bankruptcy Act, this Court recognized the problems presented by a settlement which was not fair to the individual interests of some

persons before the court. The Court in Protective Committee stated:

> . . . this Court has held that a plan of reorganization which is unfair to some persons may not be approved by the court though the vast majority of creditors have approved it.
> 390 U. S. at 435.

Thus, in such suits, the well-being of the various individuals whose rights were being litigated had to be separately considered.

b. Application Of The Fairness Standard To The Settlement Of A Title VII Action

Title VII actions illustrate well the differences between cases based upon a common corporate question and those brought to enforce individual rights.

As the Court of Appeals for the Seventh Circuit has stated, in Title VII, as opposed to in corporate actions:

> [t]he real party in interest . . . is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunity] Commission. Air Line Stewards and Stewardesses

> Association, Local 550 v. American Airlines, Inc., 455 F. 2d 101, 106 (7th Cir. 1972).

In Robinson v. P. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), the Fourth Circuit also noted that Title VII actions should not be subject to the rough justice of majority rule, stating:

> The rights assured by Title VII are not rights which can be bargained away - either by a union, by an employer or by both, acting in concert. 444 F. 2d at 799.

The emphasis upon the individual nature of Title VII rights in both Robinson and Air Line Stewards is particularly understandable in view of the class certifications in those actions. The classes in both suits were certified by the district court pursuant to Rule 23(b)(2). Since in a (b)(2) action the individual class members are not given an opportunity to opt out of the class, but are bound by the final judgment, courts take great care to make certain that an individual's Title VII rights are not denied through settlement. This was made especially clear in Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 490 F. 2d 636 (7th Cir. 1973), cert. denied, ___ U. S. ___, 94 S. Ct. 2406 (1974). In that case the district court had approved a settlement between the plaintiff union and the company, although the union had never consulted with the individual plaintiffs before entering into the settlement agreement. In reversing the district court's approval of the settlement, the Court of Appeals examined the nature

of the Title VII rights involved. Concluding that Title VII rights were not comparable to rights created by the National Labor Relations Act, which could be accommodated and adjusted by a collective bargaining representative, the court stated:

> "An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice." 490 F. 2d at 641. (Emphasis added)

In Bryan v. Pittsburgh Plate Glass Co., 494 F. 2d 799 (3rd Cir. 1974), cert. denied sub nom, Abate v. Pittsburgh Plate Glass Co., 419 U. S. 900 (1974), the Court of Appeals for the Third Circuit approved the settlement of a Title VII class action over the protests of 82 objecting plaintiffs. While Bryan at first glance may appear to represent an opposite trend in the law from Air Line Stewards and Robinson, it should be noted that the class in Bryan had been certified under Rule 23(b)(3). Unlike the petitioners here and the class members in Robinson and Air Line Stewards, the objecting plaintiffs in Bryan had been given an opportunity to opt-out of the litigation. By not exercising their rights to opt-out of the class, the Third Circuit held that the Bryan plaintiffs had elected to be bound by the results of the litigation or any court approved settlement of their claims. The holding in Bryan thus is completely in keeping with the view taken

by the Seventh and Fourth Circuits in Air Line Stewards and Robinson.

c. Application Of The Fairness Standard In The Present Case Conflicts With The Rule Making Statute Of 1934 and with Saylor v Lindsley

While the Court of Appeals in the present case recognized that the settlement of a class action in a Title VII case "should receive careful review because of the public policy embodied in such legislation" (A-25), it failed to recognize any distinctions between class actions designed to vindicate individual civil rights and those filed to secure corporate well-being. Citing to a shareholder derivative suit the Court noted that assent of the class plaintiffs was not essential to a settlement, if the trial court found it fair and reasonable. See Saylor v. Lindsley, 456 F. 2d 896, 899-90 (2nd Cir. 1970). (A-26).

While the Court of Appeals considered Saylor to be a precedent for its ruling, an examination of the Second Circuit's opinion in that decision shows Saylor to be in direct conflict with the result of the appellate court in the present case. Here, as in Saylor, the named plaintiffs never authorized their counsel to enter into a settlement agreement. Compare 456 F. 2d at 898 and page 10 infra. Here, as in Saylor, objecting plaintiffs had a right to independent counsel, but such counsel was not available on a timely basis to provide adequate representation prior to the court's approval of the settlement. Thus, the Court in Saylor specifically pointed out that the court must:

> "exercise particular care to see to it that the non-assenting plaintiff has had a full opportunity to develop the basis for his objection."

Such an opportunity was not available to the objecting plaintiffs at the hearing on objections in the present case, since they were not represented by their own counsel until after the court had actually approved the settlement. Compare 456 F. 2d at 900 and 901 and pages 10, 11 and 12 infra.

While the Court of Appeals cited to Saylor as a precedent for its ruling, the Fourth Circuit's opinion fails to note that in Saylor, on the basis of facts very similar to those in the present case, the Second Circuit Court of Appeals had reversed the lower court's approval of a settlement agreement.

Interpretation of Rule 23(e) to permit settlement of a Title VII action certified under Rule 23 (b)(2) over the objections of the named plaintiffs under the circumstances described above must raise serious concerns.

The Rule Making Statute of 1934, 28 U.S.C. § 2072 (1948), specifically prohibits the Federal Rules of Civil Procedure from abridging, enlarging or modifying the substantive rights of litigants. The Court of Appeals for the Fourth Circuit, by affirming the district court's denial of affording named plaintiffs in a class action those rights which Title VII provides to litigants who proceed in

individual actions, has brought itself into conflict with the Rule Making Statute of 1934. See Sibbach v. Wilson & Co., 312 U. S. 1 (1941).

2. To Determine Whether A Court Imposed Settlement Of A Title VII Action Over The Objections Of All Named Plaintiffs Violates The Fifth Amendment's Guarantee Of Due Process

Settlement of a class action in a shareholder's derivative suit over the objections of a named plaintiff may be permissible since plaintiff's rights are derivative rather than personal. To permit the enforcement of a settlement over objections of class members in a Rule 23(b)(3) civil rights suit may also be permissible since such class members have had an opportunity to opt-out of the litigation.

However, here the facts are otherwise. The named plaintiffs authorized to act as representatives in a class action certified under Rule 23(b)(2) have been denied the right to litigate their personal claims, a right made available to them as a result of their compliance with the procedural requirements of Title VII. (Page 3, infra). To permit their claims to be compromised by class members, particularly those who have not filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and who, thus, have no independent right of access to the courts is to turn Rule 23 on its head. Class members who may have little at stake are placed by such a ruling in a position of calling the tune to the named

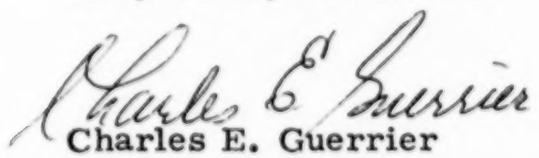
plaintiffs.

The federal rules permit the court to decertify a class action earlier certified or to create subclasses which require the separate interests of conflicting groups. Rule 23(c)(4) and (d)(4), Federal Rules of Civil Procedure. To force a settlement upon the named plaintiffs, particularly when these alternative measures are available, is to deny the named plaintiffs the procedural due process guaranteed them by the Fifth Amendment.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG DIVISION

MABEL FLINN, et al.	)	
	)	
vs.	)	Civil Action
	)	No. 71-3-P
FMC CORPORATION, et al.	)	
	)	
and	)	
	)	
MABEL TIBBS	)	
	)	
vs.	)	Civil Action
	)	No. 71-2-P
FMC CORPORATION	)	
	)	

ORDER

In these causes upon the representations made at a pre-trial conference held on November 7, 1973 and the oral Motions made at said conference, the Court finds as follows:

That the joint Motion of counsel for all parties to consolidate the two above referenced cases be, and it hereby is, GRANTED, and further

That the joint motion of counsel for all

parties to redefine the class of persons encompassed by the consolidated cases as "all of those hourly paid bargaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972, and in addition shall include Mabel Tibbs and Wilma Lee McCauley" be, and it hereby is, GRANTED, and further

That the defendants will pay into Court the sum of Fifty Eight Thousand Dollars ($58,000.00) to be paid to the attorneys of record for the plaintiffs for services rendered in this cause in the amount of Ten Thousand Dollars ($10,000.00), and the remaining Forty-Eight Thousand Dollars ($48,000.00) to be apportioned among the plaintiffs in such manner as the Court shall determine based upon further argument or evidence, and further

The Court takes under advisement the Motion of Counsel for the Plaintiffs for payment of attorneys fees prior to the entry of a final order in this cause, and it is further

ORDERED that the parties will submit briefs to the Court by November 21, 1973 setting forth their positions and arguments as to how the sum paid into Court should be apportioned among the Plaintiffs and whether attorneys fees may be paid to Counsel for the Plaintiffs prior to entry of a final order, and it is further

ORDERED that the parties may submit reply briefs at their option no later than

Order Of The District Court

November 28, 1973.

All other matters are reserved for further determination by the Court.

Approved for entry:

/s/ Whitworth Stokes

/s/ L. Edward Friend, II

Attorneys for Plaintiffs

/s/ Fred L. Davis, Sr.

Attorney for Defendant FMC Corporation

/s/ Gregory Abbey

/s/ Edward G. Atkins

Attorneys for Defendant Local 9, Textile Workers Union of America, AFL-CIO

SO ORDERED:

/s/ Robert E. Maxwell
UNITED STATES DISTRICT JUDGE

DATED: November 19, 1973.

Order Of The District Court Regarding Notice To The Class

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MABEL TIBBS,

Plaintiff,

v. Civil Action File No. 71-2-P

FMC CORPORATION,

Defendant.

§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§

MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU,

Plaintiffs,

v. Civil Action File No. 71-3-P

FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Defendants.

O R D E R

The Court, having been advised by counsel

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Order Of The District Court Regarding Notice To The Class

that an agreed settlement of all claims presented in this civil action has been reached and that the next step in the advancement of this litigation is to determine the amount of attorney fees to which Whitworth Stokes, attorney for plaintiffs, is entitled under said settlement and to designate the distributees of the settlement sum and to determine the amount of that sum to which each distributee is entitled, it is

ORDERED that counsel for the parties to this action shall prepare and submit to the Court on or before April 30, 1974, their suggestions on a proposed notice, to be served upon all parties hereto, to all members of the class here represented and to the Equal Employment Opportunity Commission, which notice shall set forth the terms of the proposed settlement and proposed distribution. The proposed notice should also include, but not be limited to, the respective parties' recommendation as to attorneys' fees and costs as well as any other related matters that are apparent to counsel.

ENTER: April 5, 1974.

/s/ Robert E. Maxwell
United States District Judge

A-6

Notice Of Proposed Settlement

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MABEL TIBBS,	]	
	]	
Plaintiff,	]	CIVIL ACTION
	]	
v.	]	NO. 71-2-P
	]	
FMC CORPORATION,	]	
	]	
Defendant.	]	

MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU,	]	
	]	
Plaintiffs,	]	CIVIL ACTION
	]	
v.	]	NO. 71-3-P
	]	
FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,	]	
	]	
Defendants.	]	

NOTICE OF PROPOSED SETTLEMENT

TO: EACH OF THE ABOVE NAMED PARTIES PLAINTIFF AND TO WILMA LEE McCAULEY; AND TO ALL FEMALE EMPLOYEES WITHIN THE HOURLY BARGAINING UNIT AT THE PARKERSBURG PLANT OF FMC CORPORATION AS OF DECEMBER 31, 1972; AND TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:

This action is pending in the United States District Court for the Northern District of West Virginia on behalf of named and unnamed female employees in the Parkersburg plant, FMC Corporation, alleging discrimination against such employees by the company, FMC Corporation, and the Union. FMC and the Union do not admit the alleged discrimination and discriminatory effects alleged in the complaints.

Pursuant to Order of the Court on August 23, 1973, the Court declared the case of Mabel Flinn, et al, to be a class action and allowed the motion of Plaintiff Wilma Lee McCauley to intervene as a member of the class. On November 19, 1973, the Court further ordered that the case of Mabel Tibbs and the case of Mabel Flinn, et al, be consolidated and that the class defined in the consolidated action be described as:

"All of those hourly paid bar-

gaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972, and in addition shall include Mabel Tibbs and Wilma Lee McCauley."

Following extensive negotiations, analysis of the legal precedents, an evaluation of the evidence, and in the interests of avoiding lengthy delay and the uncertainty and expense of litigation, the representative of the parties have proposed to the Court a settlement of all parts of the litigation. In addition, all of the prospective substantive relief available to the claimants has already been granted, outside of litigation, by changes in work practices and seniority structures and through negotiations between the defendant Company and Union.

Aside from, and in addition to the relief referred to, the defendants, FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO, by a settlement agreement submitted to the Court on November 7, 1973, and pursuant to its Order, have paid into Court the sum of Fifty-Eight Thousand Dollars to be apportioned among the members of the class in such manner as the Court may direct, and as and for allocation for reasonable attorney

fees, costs, and expenses. Further defendant FMC Corporation has agreed to bear any additional costs associated with the giving of this notice and the actual distribution of funds.

Of the total payment of $58,000 represented in the settlement, $48,000 thereof shall be allocated as follows:

First: $46,000 shall be allocated to all members of the class as defined above, except claimants Tibbs and McCauley. This class shall be broken down into three subclasses on the following basis:

(a) Subclass 1 shall be comprised of all of those members having a plant seniority date prior to January 1, 1965. This subclass consists of 126 members, each of whom, under the terms of this settlement, shall receive the sum of Two Hundred and Fifty-Five Dollars ($255).

(b) Subclass 2 shall be com-

prised of all of those members excluded from Subclass 1 having a plant seniority date prior to December 31, 1968. This subclass consists of 43 members, each of whom, under the terms of this settlement, shall receive the sum of One Hundred Seventy Dollars ($170).

(c) Subclass 3 shall be comprised of all of those members excluded from Subclasses 1 and 2, having a seniority date prior to December 31, 1972. This subclass consists of 82 members, each of whom, under the terms of this settlement, shall receive the sum of Eighty-Five Dollars ($85).

Second: Plaintiff Mabel Tibbs initially brought a separate action and has not, and cannot now benefit from any of the prospective relief available to other members of the class, and in full settlement of any and all claims she has asserted in that proceeding shall be allowed the sum of One

Thousand Five Hundred Dollars ($1,500).

Third: Plaintiff-Intervenor Wilma Lee McCauley, who also is unable to participate in prospective relief available to members of the class, shall be allowed the sum of Five Hundred Dollars ($500) in full release of any and all claims she may have as a member of this class.

Whitworth Stokes, Esquire, Counsel for the Plaintiffs, has expended considerable time and expense in preparation of this action, in discovery, and negotiations, and is entitled to be reimbursed for such costs and expenses and to a reasonable attorney's fee. Counsel has requested, and both defendants agree, that such costs, expenses, and reasonable attorney's fee shall be in the amount of Ten Thousand Dollars ($10,000).

At such time as this settlement is approved by the Court, each member shall receive her share of the settlement which will be in full satisfaction of any claim arising out of the matters alleged in the complaints.

If any member of the class wishes

to object to the proposed settlement or does not wish to participate therein, she may object by serving written notice on or before the 28th day of June, 1974, directed to The Honorable Thomas F. Stafford, Clerk of the United States District Court for the Northern District of West Virginia, Elkins, West Virginia 26241.

This notice is given pursuant to Order of the United States District Court for the Northern District of West Virginia.

June 5, 1974

Order Of The District Court Approving
Compromise Settlement

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF WEST VIRGINIA
PARKERSBURG

MABEL TIBBS,	]	
	]	
Plaintiff,	]	CIVIL ACTION
	]	NO. 71-2-P
v.	]	
	]	
FMC CORPORATION,	]	
	]	
Defendant.	]	
	]	
MABEL FLINN, GENEVA LYNN, and GARNET LOISEAU,	]	
	]	
Plaintiffs,	]	CIVIL ACTION
	]	NO. 71-3-P
v.	]	
	]	
FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,	]	
	]	
Defendants.	]	

ORDER APPROVING COMPROMISE SETTLEMENT

Actions having been brought by Mabel Tibbs,

Order Of The District Court Approving
Compromise Settlement

Plaintiff, v. FMC Corporation, Defendant, and Mabel Flinn, Geneva Lynn, and Garnet Loiseau, Plaintiffs, v. FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO, Defendants, in this Court, and pursuant to order of the Court entered on August 23, 1973, the Court declared the case of Mabel Flinn, et al. to be a class action and permitted Wilma Lee McCauley to intervene as a member of the class, and thereafter, on November 19, 1973, the Court further ordered that the said case of Mabel Tibbs and the said case of Mabel Flinn, et al, be consolidated and that the class defined in the consolidated action be described as all of those hourly paid bargaining unit female members of the Parkersburg Plant of the Company's work force on the active payroll as of December 31, 1972, and in addition, shall include Mabel Tibbs and Wilma Lee McCauley; and the parties having appeared by their respective counsel and tendered to the Court for approval a proposed settlement agreement of all parts of the litigation and pursuant to order of the Court, the defendants paid into Court the sum of $58,000 to be apportioned among the members of the class in such manner as the Court may direct and for reasonable attorney fees, costs and expenses; and after a hearing thereon, the Court directed that a copy of the notice of the proposed settlement be mailed to each of the named plaintiffs and to Wilma Lee McCauley and to all female employees within the hourly bargaining unit at the Parkersburg Plant of FMC Corporation as of December 31, 1972,

and to the Equal Employment Opportunity Commission, the form of said notice having been approved by said Court under date of June 4, 1974; and said notice having been mailed as aforesaid as ordered by the Court and objection having been made, in writing, by Mabel Tibbs, Mabel Flinn, Geneva Lynn, Garnet Loiseau, and Mary Custis, being five members of the class, and a hearing having been held by the Court at Parkersburg, West Virginia, on August 2, 1974, at which time each of the objecting members of the class testified in support of their objections to the proposed settlement; and

The Court, having maturely considered the entire record in this case, the proposed notice of settlement and the settlement terms set forth therein and the testimony of said objectors and argument of counsel for all parties, is of the opinion to and doth ORDER that the proposed settlement is adequate, reasonable and meets the standards of fairness and it is hereby approved; and it is further

ORDERED that the objections are overruled and the requests for withdrawal are denied; and it is further

ORDERED that the settlement be consummated in accordance with the terms of said notice of proposed settlement; and it is further

ORDERED that in accordance with the

terms of said settlement the said defendants be and they are hereby fully released and forever discharged from any and all claim or claims, or cause or causes of action, or part or parts thereof, from the matters set forth in the Complaints; and it is further

ORDERED that plaintiffs' counsel, Whitworth Stokes, be paid $3,000 at this time out of the amount allocated in the settlement agreement for reasonable attorney fees, costs and expenses and that within three weeks from the date of this order said plaintiffs' counsel shall submit to the Court additional information, under oath, and filed with the Clerk, concerning the number of hours spent in performing services in this litigation and itemization of expenses incurred by him and that copy of said verified statement be sent to each of the objecting parties and to Fred L. Davis, of counsel for FMC Corporation; General Counsel for the Textile Workers Union of America; and the Equal Employment Opportunity Commission; who shall have two weeks thereafter for filing objections to same; and it is further

ORDERED that this Court shall retain jurisdiction in this consolidated action for the purpose of fixing and allowing upon the proof above set forth as the Court shall direct, additional fees to Whitworth Stokes for his services rendered and disbursements; and it is further

ORDERED that the Clerk of this Court issue check in the sum of $51,000, payable to

Order Of The District Court Approving Compromise Settlement

the order of Fred L. Davis, Trustee, who is directed to deposit said check in the Union Trust National Bank, Parkersburg, West Virginia, in the name of Fred L. Davis, Trustee, and that said Trustee is directed to distribute out of said money the sum of $3,000 to Whitworth Stokes, attorney as aforesaid, and the remaining $48,000 to be distributed as set forth in the Notice of Proposed Settlement.

Dated: August 19, 1974.

ENTER:

/s/ Robert E. Maxwell
United States District Judge

Opinion Of The Court Of Appeals

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 74-2198

MABEL FLINN, GENEVA LYNN and GARNET LOISEAU,

Appellants,

-versus-

FMC CORPORATION and LOCAL 9 TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Parkersburg. Robert E. Maxwell, District Judge.

Argued: May 7, 1975 Decided: Oct. 6, 1975

Before BOREMAN, Senior Circuit Judge, and RUSSELL and FIELD, Circuit Judges.

M. E. Mowery for Appellants; Fred L. Davis, James R. Renfroe (Robert F. St. Aubin, McDougle, Davis, Handlan and Davis on brief) for Appellee FMC Corporation; Gregory Abbey for Appellee Local 9, Textile Workers Union of America, AFL-CIO.

RUSSELL, CIRCUIT JUDGE:

This is an appeal from an order of the District Court approving the settlement of a class action asserting a claim of sex discrimination under the provisions of Title VII. The scope of our review on such an appeal is narrow. [1] We are not, in reviewing the settlement, to "substitute our ideas of fairness for those of the district judge * * * ." [2] Our power,

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[1] Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic. (2d Cir. 1975) 514 F. 2d 767, 771.

[2] Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., supra (514 F. 2d at 771); State of West Virginia v. Chas. Pfizer & Co. (2d Cir. 1971) 440 F. 2d 1079, 1086, cert. denied 404 U. S. 871 (1971).

as the appellants concede and the authorities abundantly affirm, is only to be exercised "upon a clear showing that the district court abused its discretion" in approving the settlement. [3] The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits, for, as the Court said in City of Detroit v. Grinnell Corporation (2d Cir. 1974) 495 F. 2d 448, 455, "[I]f the settlement offer was grossly inadequate, * * * it can be inadequate only in light of the strength of the case presented by the plaintiffs."

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[3] Grunin v. International House of Pancakes (8th Cir. 1975) 513 F. 2d 114, 123; Greenspun v. Bogan (1st Cir. 1974) 492 F. 2d 375, 379; State of West Virginia v. Chas. Pfizer & Co., supra, (440 F. 2d at 1085, n. 1); United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co. (7th Cir. 1971) 447 F. 2d 647, 655; Young v. Katz (5th Cir. 1971) 447 F. 2d 431, 433. In the latter case, the Court, quoting with approval from the District Court opinion in Neuwirth v. Allen, as affirmed in (2d Cir. 1964) 338 F. 2d 2, said:

> " ' * * * The action of the District Court [in affirming the settlement] is presumptively right, and will not be set aside unless clearly shown to have been wrong. * * * ' "

The trial court should not, however, turn the settlement hearing "into a trial or a rehearsal of the trial" [4] nor need it "reach any dispositive conclusions on the admittedly unsettled legal issues" in the case. [5] It is not part of its duty in approving a settlement to establish that "as a matter of legal certainty * * * the subject claim or counterclaim is or is not worthless or

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4 Teachers Ins. & Annuity Ass'n. of America v. Beame (S.D.N.Y. 1975) 67 F.R.D. 30, 33; Levin v. Mississippi River Corporation (S.D.N.Y. 1973) 59 F.R.D. 353, 361, aff'd. sub nom Wesson v. Levin 486 F. 2d 1398, cert. denied 414 U. S. 1112 (1973). In Levin, the Court said:

> " * * * So, too, the Court is cautioned not to turn the settlement hearing into a trial or a rehearsal of a trial. To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more delicate one', which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate * * *."

5 State of West Virginia v. Chas. Pfizer & Co., supra, (440 F. 2d at 1086).

valuable." [6] It is not, though, to give to the settlement "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." [7] While it should extend to any objector to the settlement "leave to be heard, to examine witnesses and to submit evidence" on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. [8] So long as the record before it is adequate to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the

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6 Florida Trailer and Equipment Company v. Deal (5th Cir. 1960) 284 F. 2d 567, 571.

7 Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (1968) 390 U.S. 414, 434, reh. denied 391 U. S. 909 (1968); Newman v. Stein (2d Cir. 1972) 464 F. 2d 689, 692, cert. denied 409 U.S. 1039 (1972); City of Detroit v. Grinnel Corporation, supra (495 F. 2d at 462).

8 Glicken v. Bradford (S.D.N.Y. 1964) 35 F.R.D. 144, 148:

> " * * * this is not a trial and the test of the evidence which the Court should receive on a settlement is whether the proferred proof is of a nature which will aid it in passing upon the essential fairness and equity of the settlement."

complexity, expense and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," it is sufficient. [9]

In reviewing the record and evaluating the strength of the case, the trial court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented the plaintiffs in the negotiation. [10] The fact that all discovery has been completed and the cause is ready for trial is important, since it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case. [11] Collusion and bad faith on the part of those purporting to represent the class in the negotiations will, of course, impugn the settlement. [12] While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial

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9 See authorities cited under Note 7.

10 City of Detroit v. Grinnell Corporation, supra (495 F. 2d at 463).

11 See United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co., supra (447 F. 2d at 655).

12 Wainwright v. Kraftco Corporation (N.D. Ga. 1973) 58 F.R.D. 9, 11.

court, [13] such opinion should be given weight in evaluating the proposed settlement. [14] 'The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court, [15] though "a settlement is not unfair or unreasonable simply because a large number of class members oppose it." [16] And because the cash settlement "may only amount to a fraction of

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13 Cohen v. Young (6th Cir. 1942) 127 F. 2d 721, 725, cert. denied 321 U. S. 778 (1973). In this case, the trial court had refused to exercise its discretion on "the adequacy and fairness of the settlement upon the ground that it had no power to do so since the attorneys of record approved the compromise."

14 Blank v. Talley Industries, Inc. (S.D.N.Y. 1974) 64 F.R.D. 125, 132; Halfand v. New America Fund, Inc. (E.D. Pa. 1974) 64 F.R.D. 86, 90; Oppenlander v. Standard Oil Company (D. Colo. 1974) 64 F.R.D. 597, 624.

15 Greenspun v. Bogan, supra (492 F. 2d at 379); City of Detroit v. Grinnel Corporation, supra (495 F. 2d at 462); Kurach v. Weissman (S.D.N.Y. 1970) 49 F.R.D. 304, 306.

16 Bryan v. Pittsburgh Plate Glass Co. (3d Cir. 1974) 494 F. 2d 799, 803, cert. denied 419 U. S. 900 (1974).

the potential recovery" will not per se render the settlement inadequate or unfair. [17] With particular reference to class actions under Title VII, any settlement should receive careful review because of the public policy embodied in such legislation, but the clearly expressed intent of that Act to encourage settlements must be borne in mind. [18]

Applying these principles to the settlement approved in this case, we find no abuse of discretion on the part of the trial court. The settlement as approved was not hastily arrived at. It followed protracted discussions and was reached on the eve of trial after prior negotiations had failed. The plaintiffs were represented in the negotiation by their retained counsel, who had had extensive experience in handling sex and racial discrimination cases. His good faith and competency are not challenged. A representative of the Equal Employment Opportunity Commission was present during the hearings on the settlement and presumably fully informed herself of the terms of the settlement and its fairness. In the class involved in the suit were 253 female employees of the defendant. All these employees

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17 City of Detroit v. Grinnell Corporation, supra (495 F. 2d at 455).

18 Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., supra (514 F. 2d at 771).

were given a carefully drafted statement of the settlement as well as were provided adequate notice of the hearing thereon and of their right to object thereto. Only five members of the class filed any dissent from the settlement. Three of these were the original plaintiffs in the class suit. [19] They appeared with new counsel, who had been retained to represent them in objecting to the settlement. They were given ample opportunity to present testimony and to be heard on the settlement. They alone appeal from the approval of the settlement.

The first objection of the appellants to the settlement was that the trial court, in approving the settlement, did so "simply because it was

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19 Appellants do not argue, nor may they under the authorities, that assent of the class plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable. The original plaintiffs, however, should be given the opportunity to retain new counsel to represent them in objecting to the settlement and to be heard in opposition. See Saylor v. Lindsley (2d Cir. 1972) 456 F. 2d 896, 899-90, and Ace Heating & Plumbing Company v. Crane Company (3d Cir. 1971) 453 F. 2d 30, 33-4. That right was accorded the appellants by the District Court in this case and the appellants exercised that right as evidenced by this appeal and the record in the court below.

agreed upon by counsel for the respective parties." The record disproves any such contention. The trial court recognized and stated positively in the record that the mere fact that counsel "believe it is an honorable settlement" and one which "in in their considered judgment, the appropriate way to terminate the litigation," did not relieve the Court of its responsibility to "oversee, overview and to ultimately pass upon the question of whether the proposed settlement agreement meets the test, the criteria, the standards that are impressed upon the Court by Act of Congress." It later in its oral opinion approving the settlement emphasized anew the Court's responsibility in approving a settlement of a class action. It stated that "it is the sole responsibility of the Court * * * in approving or disapproving a settlement such as presented here."

The appellants go on to assert that, even if the trial court had recognized its responsibility in connection with the proposed settlement, it failed to have " a trial or hearing on the merits of the allegations raised in the employee's complaint." There is, as we have seen, no requirement for a trial on the merits as a prerequisite to approval of a settlement. All discovery had been completed in the case, which had been pending for several years in the court. Various motions had been heard, including one for summary judgment and another involving the designation of the suit as a class action. The trial court had considerable familiarity with the

case and the respective positions of the parties. Further, it had extended to the appellants the right to present fully on the record their objections to the settlement. In their testimony, they gave the case the appearance more of a complaint about seniority and transfer rights under their collective bargaining agreement than about sex discrimination. Their real complaint related to the effect of such transfers, the propriety of which on technological grounds they did not dispute, on their seniority. The appellant Loiseau, for instance, stated her complaint arose out of a transfer made in 1958 from an incentive pay department to a straight hourly pay department and to the granting of priority in available incentive pay jobs to employees brought over from the discontinued plant of the appellee at Roanoke. However, the employees brought from Roanoke, who secured the job she wanted, were, she admitted, female, too. The appellant Flinn testified that her complaint arose out of a departmental transfer that took place in 1963. She claimed that an employee when transferred to another department was not allowed to carry her seniority with her, though she asserted this was contrary to the collective bargaining agreement. [20] It was conceded,

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[20] Her testimony on this point was that, under Section D of the collective bargaining agreement, "when the jobs are transferred to another department, the employees so affected would move with no loss of adjusted seniority." She complained to the Union on this but, according to her, the Union "refused" to do anything.

however, that the seniority rules were negotiated between the employer and the Union and were "applicable to males and females alike." The appellant Lynn, according to her testimony, "had to transfer due to customer requirements and I had to transfer and lost half of my seniority." Her loss of seniority placed her behind other female employees in the department to which she transferred. In their complaint, the appellants seemed to base their claim of sex discrimination on the assertion that female employees were employed on an incentive pay basis, whereas male employees were on a straight hourly pay basis. As we have seen, however, the appellants, in their own statements of their complaint, objected to being transferred from an incentive pay basis to a straight hourly pay basis, and the reason expressed for their discontent was than an employee earned more on an incentive pay basis than on a straight hourly pay basis. Moreover, no one of the appellants, though conceding that the settlement of transfer rights gave them the privilege of transferring to straight time, had claimed any such right. This reinforces the conclusion that the claim of the appellants related not so much to sex discrimination as to their right, when required to transfer, to transfer to an incentive pay job rather than to a straight hourly pay job.

The trial court, in its oral order approving the settlement, reviewed this testimony and other evidence in the record. Its review demon-

strated its familiarity with the contentions of the parties and its careful evaluation of the merits of the appellants' claims. It recognized that there were two classes of female employees involved. The three objectors, as we have already observed, really were complaining about the seniority rules applicable in connection with departmental transfers, whether by males or females. These transfers ante-dated the enactment of Title VII. And the persons who secured priority in seniority over them on transfer were, it would seem, women. Whatever their complaint, they concede it has been satisfied "by virtue of the collective bargaining process." The trial court indicated the weakness it perceived in this claim of the appellants themselves. It took particular note of the possible untimeliness of the plaintiffs' claims and of the alleged bar of the statute of limitations. On the other hand, there were some female employees engaged in custodial work, whose pay was less than that of the male employees on the custodial force. Whether there was some bona fide occupational justification for this difference and whether the male employees performed additional services were claims asserted in defense. Who would prevail in connection with these claims was, in the opinion of the Court, in doubt. In any event, the settlement on the merits has resolved this issue to the satisfaction of the employees concerned and no employee in this group has appealed from the approval of the settlement.

Actually, the appellants do not, it would

seem, complain of the overall amount to be paid under the settlement. It is what they are individually to receive out of that settlement that prompts their objection and this appeal. The amount each employee, it is true, is receiving is not large. And an employee, who feels she was discriminated against in 1958 will naturally feel that she should receive considerably more than a fairly recent employee, even though her claim of unfairness occurred some six years before the enactment of the statute on which she bases her action. This feeling is no doubt increased by the consideration that the appellants were the ones who brought the action and had by their efforts made available the fund. It must be borne in mind, though, that the appellants chose to bring their action as a class action, over the objection of the appellee. In so doing, they disclaimed any right to a preferred position in the settlement. Moreover, despite the fact that their complaint relates to an act that occurred many years ago, it may well be, as the trial court observed, that their individual claims would be considerably weaker than others in the class, particularly those working on the custodial force. The trial court was entitled to consider, in evaluating the fairness of the cash settlement, that all complaints of unfairness, whether they related to seniority rights under the collective bargaining agreement or any form of discrimination, racial or sexual, had been satisfied and that settlement had been "approved by the Government." As the Court in City of Detroit said, "[A]ny claim by appellants that the

settlement offer is grossly and unreasonably inadequate is belied by the fact that, for all appearances, the vast preponderance of the class members willingly approved the offer." [21] Under all these circumstances, we find no abuse of discretion on the part of the trial court in approving the settlement herein. The judgment of the District Court approving the settlement is accordingly affirmed.

AFFIRMED.

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21 495 F. 2d at 462.

Rule 23, Federal Rules of Civil Procedure

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

Rule 23, Federal Rules of Civil Procedure

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a

specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

CERTIFICATE OF SERVICE

Three copies of the Petition for a Writ of Certiorari and Appendix have been furnished, by United States mail, first-class, postage prepaid, this 5th day of January, 1976, to:

Fred L. Davis, Esq.
McDougle, Davis, Handlan & Davis
7th Floor, Union Trust Building
700 Market Street
Parkersburg, West Virginia 26101

Attorney for Respondent, FMC Corporation

Gregory Abbey, Esq.
Associate General Counsel
Textile Workers of America
99 University Place
New York, New York 10003

Attorney for Respondent, Local 9,
Textile Workers Union of America

Charles E. Guerrier
Attorney for Petitioner